

48A C.J.S. Judges § 239

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

B. Waiver of Disqualification

2. Acts Constituting Waiver

§ 239. Generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  52, 53

Where the disqualification of a judge may be waived, the waiver may be express or may arise by implication from conduct.

Generally, where the disqualification of a judge to sit in a case may be waived, the waiver ordinarily may be either express¹ or it may be implied² as by conduct.³ A waiver generally results from a failure to take advantage of, or to follow, the procedure for disqualification provided by statute⁴ or from the unexcused failure to make a proper or timely objection⁵ after acquiring knowledge of the facts upon which such disqualification would be grounded.⁶ If a complaining party sits idly by and awaits the outcome of the proceedings after receiving knowledge of a trial judge's disqualification, or after the circumstances or law creates a presumption of such knowledge, the party will be held to have waived the disqualification and consented to trial by the judge presiding.⁷ Even if information regarding a judge's potential conflict of interest is simply reasonably available and a party does not move to recuse the judge, the right to recuse is waived.⁸ However, waiver resulting from a failure to move to disqualify a judge may not be absolute.⁹

A waiver of the right to have a judge disqualified results from a voluntary withdrawal of the affidavit of disqualification or motion for change of judge¹⁰ or from acquiescence in disregard of such affidavit.¹¹ Also, a petitioner waives the right to a change of judge when the petitioner rejects the judge's offer to trade places with another judge.¹²

However, where the statute involved is a mandatory disqualification statute, a party does not waive an objection that a judge is disqualified where the party files an untimely objection or fails to object.¹³ Also, although generally a defendant must move

to disqualify a trial judge or the issue is waived, the issue of disqualification of a judge is not waived if potential grounds for disqualification are known to the trial judge but not the defendant.¹⁴ Similarly, the issue of disqualification of a judge is not waived, even if a party fails to move to disqualify the judge, if the grounds for disqualification are that the trial judge is aware of a polygraph examination or some similar basis which gives the trial judge knowledge of some fact or circumstance directly relating to the defendant's guilt on the charged offense.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Orthopedic resident waived challenge to trial judge's failure to recuse herself due to alleged appearance of impropriety arising from judge's handling of examination of judge's first cousin, who was called as hostile witness by resident, in employment discrimination and retaliation action against orthopedic residency program, program's director, and others premised on resident's probation from residency program; resident's counsel never asked judge to step down, even when she expressed concerns about judge's handling of witness, and at sidebar conference following witness's direct examination, which occurred near end of trial, resident's counsel was reminded of her earlier acquiescence to judge presiding over proceeding, at which time she withdrew request for curative action. 28 U.S.C.A. § 455(a). *Shervin v. Partners Healthcare System, Inc.*, 804 F.3d 23 (1st Cir. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 Mo.—*State v. Purdy*, 766 S.W.2d 476 (Mo. Ct. App. E.D. 1989).
As to consent as constituting waiver, see §§ 243, 244.
- 2 Ga.—*Jackson v. State*, 146 Ga. App. 736, 247 S.E.2d 512 (1978).
Iowa—*Citizens First Nat. Bank v. Hoyt*, 297 N.W.2d 329 (Iowa 1980).
- 3 Mo.—*State v. Purdy*, 766 S.W.2d 476 (Mo. Ct. App. E.D. 1989).
As to participation in proceedings as waiver, see §§ 240 to 242.
- 4 Tex.—*In re Guardianship of Jordan*, 348 S.W.3d 401 (Tex. App. Beaumont 2011).
Failure to file affidavit of disqualification
Ohio—*State v. Were*, 118 Ohio St. 3d 448, 2008-Ohio-2762, 890 N.E.2d 263 (2008).
As to manner and mode of objecting, see §§ 298 to 323.
- 5 Ala.—*Ex parte Parr*, 20 So. 3d 1266 (Ala. 2009).
Conn.—*Burns v. Quinnipiac University*, 120 Conn. App. 311, 991 A.2d 666, 255 Ed. Law Rep. 291 (2010).
La.—*State v. Franks*, 55 So. 3d 34 (La. Ct. App. 2d Cir. 2010), writ denied, 75 So. 3d 451 (La. 2011).
Me.—*Charette v. Charette*, 2013 ME 4, 60 A.3d 1264 (Me. 2013).
As to time to object, see §§ 306 to 310.

6 N.D.—*State v. Jacobson*, 2008 ND 73, 747 N.W.2d 481 (N.D. 2008).

7 Ind.—*Schmitter v. Fawley*, 929 N.E.2d 859 (Ind. Ct. App. 2010).

8 Fla.—*Steinhorst v. State*, 636 So. 2d 498 (Fla. 1994).

Party having reason to know facts

Ind.—*Renforth v. Fayette Memorial Hospital Ass'n, Inc.*, 178 Ind. App. 475, 383 N.E.2d 368 (1978).

9 Mich.—*Tyrrell v. Tyrrell*, 107 Mich. App. 435, 309 N.W.2d 632 (1981).

10 Conn.—*Jaeger v. Connecticut Siting Council*, 128 Conn. App. 243, 17 A.3d 484 (2011).

As to objections to judge and proceedings thereon, see §§ 298 to 334.

11 Ill.—*People v. Bach*, 74 Ill. App. 3d 893, 30 Ill. Dec. 527, 393 N.E.2d 563 (1st Dist. 1979).

Wash.—*State v. Smith*, 13 Wash. App. 859, 539 P.2d 101 (Div. 2 1975).

12 Wash.—*State v. Hansen*, 107 Wash. 2d 331, 728 P.2d 593 (1986).

13 Ky.—*Small v. Com.*, 617 S.W.2d 61 (Ky. Ct. App. 1981).

14 Mich.—*People v. McLeod*, 107 Mich. App. 710, 310 N.W.2d 31 (1981).

15 Mich.—*People v. McLeod*, 107 Mich. App. 710, 310 N.W.2d 31 (1981).